NO. 93-23

In the Supreme Court of the United States

OCTOBER TERM, 1993

LINDA LESLIE MAXWELL,
Petitioner,

v.

MONSANTO COMPANY AND RICK BROWN,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARIMI LAW FIRM
A LAW CORPORATION

DARRYL J. CARIMI, T.A.
Louisiana Bar Number: 3878
Fourth Floor, Heritage Plaza
111 Veterans Boulevard
Metairie, Louisiana 70005
Telephone: (504) 831-2641

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Whether the interpretation of LSA-R.S. 23:1061 by the United States Court of Appeals for the Fifth Circuit is correct, or whether it is the contrary interpretation by the Supreme Court of Louisiana which is correct as to whether factors listed in the amendment thereto may be considered in determinations of statutory employer status?

2. Whether a corporate executive's personal liability to an injured third-party is contingent upon some form of personal contact with the victim under Louisiana law as interpreted by the United States Court of Appeals?

PARTIES TO THE PROCEEDINGS

Linda Leslie Maxwell

Monsanto Company

Rick Brown

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LINDA LESLIE MAXWELL,

Petitioner,

v.

MONSANTO COMPANY AND RICK BROWN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

To The Honorable William H. Rehnquist, Chief Justice, and to the honorable Associate Justices of the Supreme Court of the United States:

Linda Leslie Maxwell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals, which is the subject of this petition, is unplublished and unreported; it is reproduced herein as Appendix B. The denial of Petition for Rehearing is reproduced herein as Appendix A. The judgment of the United States District Court for the Eastern District of Louisiana dismissing Plaintiff's complaint appears herein as Appendix C. The basis for the District Court's Judgment is found in Appendix D and Appendix E as Ruling(s) on Motion (s). The notice of Removal from State Court is found in Appendix F.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 17, 1993. A timely petition for Rehearing was denied on March 29, 1993.

The jurisdiction of this Court is invoked pursuant to 28 United States Code section 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Louisiana Civil Code article 23:1061, particularly the amendment of January 1, 1990, all of which is reproduced in Appendix G.

STATEMENT OF THE CASE

Petitioner's injury occurred on February 11, 1990 at the shipping terminal of Monsanto Company's plant in St. Charles Parish, Louisiana. Petitioner was a truckdriver for Mel Motors Express, Inc. which had contracted with Monsanto to transport a load of product to Monsanto's plant in North Carolina. Petitioner's right arm was completely smashed and severed between two trailers at the loading dock as she was positioning her trailer for loading.

Petitioner filed suit in state court alleging negligence naming as defendants, Monsanto Company and Rick Brown, the Company's Safety Supervisor. The case was removed to the United States District Court, Eastern District of Louisiana. (Appendix F) Petitioner's request for remand to state court was denied upon a finding of fraudulent joinder. (Appendix E) Monsanto claimed the status of Petitioner's statutory employer, and on that basis, the District Court dismissed the suit as to both defendants. (Appendix C) Petitioner's motions for reconsideration and for a new trial were denied. Appeal was made to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the District court on February 17, 1993 (Appendix B) and denied plaintiff's Petition for Rehearing on March 29, 1993. (Appendix A)

This case raises issues involving conflicting interpretations of state statute by the United States Court of Appeals for the Fifth Circuit and the Supreme Court of Louisiana Those conflicting interpretations concern tort immunity granted to principal employers upon findings of statutory employment. Also, at issue is the misinterpretation by the Fifth Circuit of state jurisprudence concerning the standards applicable to matters of fraudulent joinder and the personal liability of corporate executive officers.

EXISTENCE OF JURISDICTION BELOW

The district court exercised jurisdiction to remove the action pursuant to 28 United States Code section 1441(a)(b).

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT HAS MISINTERPRETED THE AMENDMENT TO LSA-R.S. 23:1061 AS PRECLUDING CONSIDERATION OF THE CRITERIA THEREIN TO DETERMINE STATUTORY EMPLOYMENT, SUCH INTERPRETATION BEING CONTRARY TO THE CLEAR MEANING OF THE STATUTE AND AS RECENTLY INTERPRETED BY THE SUPREME COURT OF LOUISIANA TO THE EFFECT THAT THESE CRITERIA ARE TO BE GIVEN CONSIDERATION.

In order to qualify for tort immunity under Louisiana Workers' Compensation law, a principal contractor must show that the contractor's work is part of the "trade, business, or occupation" of the principal. Until *Berry v. Holsten Well Service, Inc.*, (La. S. Ct., 1986), 488 So.2d 934, statutory employment was determined by the integral relation/essential to business test.

In *Berry,* the court reviewed past jurisprudence and came up with a multiple-part test to determine whether contract work was part of a principal's trade, business, or occupation.

> (1) If the work involved was "specialized per se" then the defendant was not the plaintiff's statutory employer. Work was specialized per se if it required a degree of

> skill, training, experience, education, and/or equipment not normally possessed by those outside the contract field. If the work was not specialized per se, then the court must look to the second inquiry.
>
> (2) This second level involved a comparison of the contract work and the principal's TBO. Here the court would look at whether the work was routine or customary? Regular and predictable? Nonrecurring and extraordinary construction or repair and general maintenance? Did the defendant have the equipment and manpower capable of performing the work? What was the industry practice concerning who did the work at issue?
>
> (3) Was the principal actually engaged in the work at the time of the alleged incident? If not, the defendant could not be a statutory employer.

In response to *Berry,* the Legislature amended LSA-R.S. 23:1061 to include the following language:

> The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work. (App. G)

It is this language which is at issue.

In *Salsbury v. Hood Industries*, 982 F.2d 912 (5th Cir. 1993) the Fifth Circuit interprets the Amendment to mean:

> that the Berry factors (such as specialization) "shall not prevent" a principal from being considered a statutory employer. This means that the factors listed in the amendment cannot be used by themselves or in combination with other factors to defeat statutory employer status.

Salsbury came down dated February 10, 1993, stating that, "no reported Louisiana state court decisions have applied the Amendment." supra, p. 3. But, the Supreme Court of Louisiana had issued on November 30, 1992, *Bowen v. General Motors Corp.*, 608 So.2d 999 (La. 1992), a case of striking similarity to the instant case, except that it is a *Berry* case, the plaintiff's injuries having occurred prior to the effective date of the Amendment, January 1, 1990. Applying the *Berry* analysis, the Court of Appeals determined, and the Supreme Court of Louisiana affirmed, as follows:

> "Reviewing these factual circumstances in conjunction with the Berry analysis it is clear the interstate transportation of parts is a *routine* and *customary* part of GM's business that is performed on a *regular* basis. In addition, while GM chooses to hire independent trucking companies for their interstate deliveries, they are *capable* of performing this contract work with their *own equipment* and *manpower*. Therefore, we find the interstate transportation of parts is a part of

> GM's regular business. The practice in the *industry* ranges from minimal interstate transportation to extensive interstate transportation. Thus, it is common in the industry for the companies to participate in interstate transportation. Lastly, we find, based upon the evidence, GM *was involved in this type of work* at the time of plaintiff's accident." (emphasis added)

What we have above is application of the *Berry* test. General Motors (the principal) was correctly found to be the statutory employer of Bowen, a truckdriver for the common carrier contractor, Bonded Freight Services, Inc.

Now, of monumental significance is the fact that the Supreme Court of Louisiana in *Bowen*, at p. 1001, states that,

> This amendment apparently broadens the definition of statutory employers. However, given the facts of the present case, **we believe the outcome would be the same under the amended statute as under the pre-amendment statute.**

With that statement, the Supreme Court of Louisiana specifically refutes the Fifth Circuit's rejection of the *Berry* analysis. According to the Supreme Court, the Amendment does not reject the *Berry* analysis, but instead incorporates that analysis into the wider customary practices test as developed by the Supreme Court in *Reeves v. Louisiana and Arkansas Railway Co., et al*, 282 So.2d 503 (1973). No other interpretation would be commensurate with the Supreme Court's assessment that, "the outcome would be

the same under the amended statute as under the pre-amendment statute." The *Berry* factors are to be considered, just not as individually determinative. Accordingly, the analysis remains the same, given the amendment, or not.

Application of the criteria, as in *Bowen*, above, demonstrates that Monsanto (unlike General Motors) is not Maxwell's statutory employer. Consider that, (1) Monsanto is not capable of performing the contract work (trucking) as it owns no trucks and employs no truck drivers, (2) trucking is not a routine and customary part of Monsanto's business and is not performed on a regular basis, (3) the industry practice is the same as Monsanto's which is to contract out the trucking, and (4) Monsanto was not involved in this type of work (trucking) at the time of plaintiff's accident. Whether by the amended statute or by the pre-amendment statute, Monsanto is determined *not* to be the statutory employer of Linda Maxwell.

Given the conflict between the Fifth Circuit's *Salsbury* decision and the Louisiana Supreme Court's decision in *Bowen*, it seems imperative that the United States Supreme court resolve the conflict as to the meaning of the statute.

Had the Louisiana Legislature desired the complete and total elimination of any form of analytical consideration, all that was necessary was to unequivocally pronounce by legislative fiat every principal to be statutory employer. This they did not do, nor should have the Fifth Circuit. But, the Fifth Circuit has done so by virtue of the *Salsbury* decision. *Salisbury* strips away all consideration

and analysis leaving the legal community without a test. As prophesied by Professor Galligan,

> "Returning to the amendment to 1061, one will note that if the courts read the statute as precluding them from considering the factors listed, there is, in fact, nothing left for them to look at. I mean, work is either specialized or not. If the Court can't consider that fact, they have nothing else to look at. That's a vacuum, baby. We're talking big time pre-primordial fog. Likewise, if the court cannot consider if the work is extraordinary or routine, there's nothing else at which to look. Work is either routine or not. You see the problem? So that means to me and to Professor Johnson, I think that the *Berry* factors are still relevant, just not determinative."(Thomas C. Galligan, "Update on the Statutory Employer," *The Trial Brief,* Vol 26, No. 2, 1992, p.3)

It appears that the *Salsbury* Court prefers the fog, as upon consideration of the argument above, it determines that, "We do not agree with that interpretation."

The better view as to the real meaning of the Amendment is that the *Berry* factors must still be considered, just not to be determinative, in part or in whole. The language of the Amendment does not reject the *Berry* factors, but is *inclusive* of those factors in proper analysis. For example, *Berry* rejected the notion that the work could be "specialized" per se and still result in a finding of statutory employment. The *Berry* test was by its nature designed to be mutually exclusive. In other words, you could not be a statutory employer while the contractor performed

"specialized" work; you could not be a statutory employer while the contractor performed "extraordinary construction;" you could not be a statutory employer and not have direct employees performing the contracted work; you could not be a statutory employer while the contractor performed "routine" work; you could not be a statutory employer unless you had "equipment or manpower capable of performing the work." What the Louisiana Legislature rejected was the determinative design of the test. It did not reject, specifically or otherwise, nor did it repudiate, implicitly or otherwise, any of the *Berry* factors. What the legislative language of the amendment dictates is that all relevant factors, including the *Berry* factors, be *considered* with no particular factor being individually determinative. The necessary and sufficient conditions of the *Berry* test were much too narrow said the Legislature; the analysis is over simplified. For example, all that was necessary to satisfy *Berry* was that the contractor be performing specialized work. Specialized work then satisfied both the necessary and sufficient conditions for a finding of statutory employment. The *Berry* model of the world of work is oversimplified. The legislature recognized the real world as not so simple. The legislature recognized by Amendment that a complex world requires a comprehensive analytical model including all relevant factors, and

> "the fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is ususlly done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work."

Thus, the legislative model is comprehensive, subsuming the *Berry* factors within an expanded framework of analysis. The Amendment rejects nothing but the self-determining, mutually exclusive design of the *Berry* analysis. Contrary to rejecting the *Berry* factors, the Amendment includes all *Berry* factors wherein is stated that, "the fact that the work is (*Berry* factors)..shall not prevent the work...from being considered part of the principal's trade, business, or occupation..." There is no rejection in this language. What is said, contrary to *Berry*, is that the "specialized" nature of the work shall not prevent such work from being *considered* as part of the principal's work. In other words, the "specialized" nature of the work is to be considered along with all other such relevant considerations. And, the term "consider" means "to think about," "to take into account." *Webster's Ninth New Collegiate Dictionary,* Merrian-Webster, Inc., 1983, p. 279. What then, is to be considered, to be taken into account, but the nature of the work in terms of specialization, routinization, etc. True, "The Amendment tracks the language...of the *Berry* analysis," but, there are no words of rejection, not is there an inference of such rejection, nor is there support in the language of the Amendment for any such "implicit repudiation" as found by the Court in *Salsbury.*

There clearly is no legitimate interpretative basis in the Amendment by which the Appellate Court "specifically rejects" the *Berry* factors. What is clear is that the amendment is intended to be *inclusive,* not exclusive, of all relevant factors of analysis including the *Berry* factors. The *Salsbury* Court would have it the other way - that the amendment, in fact, excludes these factors and that the legislature intended such exclusion. The *Salsbury* inter-

pretation has no rational basis, and, it is not practical as it leaves a vacuum, that is, no test by which to gauge the efficacy of the statutory employment issue. The *Berry* analysis was objectionable to the legislature because its analytical framework (design) was oversimplified. However oversimplified, the *Berry* approach is correct as recognized by the legislature. That is the reason all of its factors remain included, and not excluded, for purposes of analysis. The legislature recognized that without benefit of those factors, there is no analysis, no test. While *Berry* suffered deficiencies of form and design, *Salsbury* creates an intolerable analytical vacuum.

II. THE APPELLATE COURT HAS MISINTERPRETED LOUISIANA LAW WITH RESPECT TO EXECUTIVE LIABILITY ERRONEOUSLY REQUIRING THAT THE CORPORATE OFFICER HAVE PERSONAL CONTACT WITH THE VICTIM, AND ERRONEOUSLY CONCLUDING RICK BROWN TO BE CLOAKED ONLY WITH NON-CULPABLE GENERAL ADMINISTRATIVE DUTIES. THEREBY ERRONEOUSLY SUPPORTING A FINDING OF FRAUDULENT JOINDER.

Concluding its analysis, the District Court determined that "In these circumstances, he (Rick Brown) cannot be held personally liable to the plaintiff." And that, "Under the fraudulent joinder doctrine, the action was properly removed and remand not warranted." (Appendix E) Reasoning to such conclusion, the Trial Court states that,

> "The plaintiff does not allege that defendant Rick Brown personally instructed her or insisted that she back up the truck to the loading area or

> that he himself designed the unsafe work area. She alleges that he breached his general duty of loss prevention by failing to ensure that the loading area was reasonably safe. Plaintiff seeks to impose liability on the General Supervisor of Loss Prevention for breaches of his general administrative duties of supervision." (Appendix E)

The District Court has fallen prey to Judge Summers' dissenting warning in *Canter v. Koehring Company,* 283 So.2d 716, at 728, that "The vague and indefinite formula the majority attempts to articulate for the solution of these suits...can only lead to confusion and harsh injustices..."

In its confusion, the District Court has misinterpreted and misapplied the standard for review as articulated and approved by the Supreme Court of Louisiana in *Canter.* Answering the question as to,

> "When and under what circumstances is the officer, agent, or employee of an employer of principal liable to a third person (including a co-employee), when injuries caused to such third person result from the breach of a duty imposed by his employer or principal upon the the officer, agent or employee?"

the Supreme Court of Louisiana approves the following criteria for imposing such individual liability:

> "1. The principal or employer owes a duty of care to the third person (which in this sense includes a co-employee), breach of which has caused the damage for which recovery is sought.

2. The duty is delegated by the principal or employer to the defendant.

3. The defendant officer, agent, or employee has breached this duty through personal (as constasted with technical or vicarious) fault. The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances - whether such failure be due to malfeasance, misfeasance, or nonnfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.

4. With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance or mal-performance and has nevertheless failed to cure the risk of harm." (*Canter*, 721)

In *Canter*, The Supreme Court of Louisiana stated that the principal owes a duty of care to third persons, for breach of which recovery may be sought.

Part 2 of the *Canter* test specifies that "This duty (of safety) is delegated by the principal or employer to the defendant." Defendant Brown's job title is "General Supervisor, Loss Prevention." As stated by noted authority, Richard I. Henderson,

> "The most important element in the identification section (of the job description) is the job title...The job title indicates to anyone reviewing the (job) description, and specifically to the job holder, the particular field of activity of the job, its relationship to that field, and its professional standing...The title is the first step in defining the job...It is valuable as an outline to department, division, or functional groupings...(Richard I. Henderson, *Compensation Management: Rewarding Performance,* 3rd ed., Reston Publishing Company, Inc., 1982, p. 157)

It is clear from Brown's job title that Monsanto has delegated to him as an executive of the corporation all duties and responsibilities associated with the safe operation of the Luling facility. Brown has been charged specifically by Monsanto as its agent with delegated authority to act for Monsanto in all matters of safety and loss pervention. As Monsanto's Manager of Loss Prevention, Brown is clothed with such duty of safety and should be expected to plan, organize, implement and coordinate Monsanto's entire Loss Prevention Program. The objective of such a program is to reduce or eliminate occupational injuries, illnesses, deaths and the resultant financial losses to Monsanto. Brown's job is to identify and appraise working conditions which could produce accidents and financial losses to Monsanto. In order to make such identification it is expected that Brown would conduct research to identify

hazards and evaluate loss producing potential of particluar systems, operations or processes. Once identified, Brown develops accident-prevention and loss-control systems and programs for incorporation into Monsanto's operational policies. Once reduced to policy statements, Brown must coordinate these safety activities throughout Monsanto's Luling facility in order to ensure organizational compliance. At all times, Brown is acting under the general supervision of senior-level management. But, he is the delegatee of authority commensurate with the responsibility specifically associated with loss prevention and safety management. Whenever appropriate, Brown would be expected to develop and recommend to general management new procedures and approaches to safety and loss prevention. It would be expected that Brown would correct unsafe environmental working conditions such as those identified in Petitioner's Petition. The docking space, patently undersized, was made further inadequate and unsafe by the proximity of deep drainage ditches, electrical poles and guide wires, a restricting fence, gravel surface and unmarked concrete roadbed. Brown was responsible as Monsanto's Manager of Loss Prevention for all these safety hazards! It is clear that Defendant, Rick Brown, as General Manager, Loss Prevention, has been delegated *all* duties and responsibilities associated with the Safety and Loss Prevention Program at Monsanto's Luling facility. This statement is made manifest by Brown's job title and its attendent duties and responsibilities noted above. Illustrative of Brown's job duties and responsibilities are the elements contained in the following Safety Managers job description as formulated by the U.S. Department of Labor in its *Dictionary of Occupational Titles,* which book is generally considered to be the "Bible" of occupational job descriptions:

012.167-058 SAFETY MANAGER (profess. & kin.)

Plans, implements and coordinates program to reduce or eliminate occupational injuries, illnesses, deaths, and financial losses:

Identifies and appraises conditions which could produce accidents and financial losses and evaluates potential extent of injuries resulting from accidents. Conducts or directs research studies to identify hazards and evaluate *loss producing potential* of given system, operation or process. Develops accident-prevention and loss control systems and programs for incorporation into operational policies of organization. Coordinates safety activities of unit managers to ensure implementation of safety activities throughout organization. Compiles, analyzes, and interprets statistical data related to exposure factors concerning occupational illnesses and accidents and prepares reports for information of personnel concerned. Maintains liaison with outside organizations, such as fire departments, mutual aid societies, and rescue teams to assure information exchange and mutual assistance. Devises methods to evaluate safety program and conducts or directs evaluations. Evaluates technical and scientific publications concerned with safety management and participates in activities of related professional organizations to update knowledge of safety program developments. May store and retrieve statistical data, using computer. U.S. Department of Labor, *Dictionary of Occupational Titles* 4th ed. Revised, Volumes I and II, 1991, p. 28) (Emphasis added)

Thus, it is clear that Defendant Brown has been delegated the duty to "identify ... a condition which could produce an accident;" in plain English, look at the loading dock and see that in trying to maneuver a 70 foot rig into position, Petitioner was at serious risk of injury. That Brown's job encompassed this duty satisfies Part 2 of the *Canter* test.

Brown is individually liable for the personal breach of his duty of safety in conformance with Part 3 of the *Canter* test.

According to *Canter,* such breach occurs,

> "...when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances-whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty." (*Canter,* p. 721)

At all times pertinent hereto, Brown served as General Supervisor, Loss Prevention at Monsanto's Luling plant. Individual liability attaches to Brown upon breach of his duty to provide a reasonably safe work place. Such personal liability extends to injured third parties including this Petitioner. *9 to 5 Fashions, Inc. v. Spurney,* 520 So.2d 1276, 1283 (1988). The District Court erroneously concluded that Brown had been "fraudulently joined." The Court

premised its conclusion stating that "In order for the plaintiff to sustain his [sic] claim against the individual employee, who is here the ***General*** Supervisor of Loss Prevention, the employee must have breached an independent ***personal*** duty to the customer." (And of course, Maxwell is not a "customer.") But worse, the Court unwittingly focuses its cursory analysis on the terms "personal" and "general."

In its analysis, the Court observes that "The plaintiff does not allege that defendant Rick Brown ***personally instructed her*** or ***insisted*** that she back up the truck to the loading area or that ***he himself designed*** the unsafe work area." Such analysis is patently wrong. Nowhere in the law is it required as a condition of individual liability that Brown be directly involved with Petitioners activities, nor that he have personal contact with her, nor that he shall have "designed the unsafe work area." The law requires no such personal contact as the Court infers necessary to individual liability. The Fifth Circuit relies incorrectly on *LeJeune v. Shell Oil Company,* 950 F.2d 267 (5th Cir. 1992) as requiring such personal contact. That decision did not turn on personal contact and nowhere in *Canter,* nor its progeny, is such a condition stated, implied or inferred. What is required is that Brown be clothed by his employer with a duty, properly delegated, such as to make him specifically and personally responsible and accountable to general-level management for particular organizational activities. As noted earlier, Monsanto has properly delegated authority to Brown as "General Manager, Loss Prevention" *all* duties and accountabilities normally associated with the highly specialized functional area of expertise designated as Safety and Loss Prevention. The record clearly shows

the delegation of such duty as to satisfy the *Canter* test. The personal duty owed this Petitioner by Brown is the same duty of safety owed by his employer. The *Canter* test speaks to duty, not as the Court supposes, to some direct personal contract between tortfeasor and victim, between Brown and Maxwell, nor is it required that Brown be "at the scene" as suggested by the Court in *LeJeune,* supra, p. 271. That is precisely why Petitioner's allegations, as specially directed to Brown, flow to his duties as Monsanto's Manager of Loss Prevention. Paragraph Eleven (11) of the Petition for Damages states that,

> "his (Brown's) duties involves seeing that the load areas were reasonably safe," and that "Brown was negligent" in that "Brown knew or should have known that the loading area was unsafe in that there was insufficient space...because of several hazards such as a nearby drainage ditch, close by electrical poles and guide wires, and failing to provide a spotter." (App. H)

These allegations correctly go to duty, not to personal contact, as the Court would require. In *Adams v. Fidelity And Casualty Co. of New York,* 107 So.2d 496 (LA. App. 1st Cir. 1958), the Court held that,

> "corporate officers and supervisors could be held individually liable for the death of a co-employee caused by their personal fault in failing to correct a dangerous condition of the work-premises personally known to them and within the *ambit of their work responsibilities.*" (emphasis added)

It is clear that the safety of the Monsanto terminal facility, at which site plaintiff lost her right arm, was within the

"ambit" of Brown's work responsibility as Monsanto's Manager of Loss Prevention. That Brown may not have had personal contact with Maxwell is irrelevant. What is relevant is that the duty of safety delegated to Brown extended to Maxwell.

Next, the Court erroneously focuses on the term "General" as contained in Brown's job title, "General Supervisor, Loss Prevention," and just as unwittingly and inattentively as with the term "personal" encountered earlier, transitions thought and concept from job title to "general administrative duties of supervision" for which Brown is deemed not individually liable as a matter of law. Again, the Court misapplies the *Canter* test. Defendant Brown *is* Monsanto's supervisor to whom its duty of safety has been properly delegated. There is no one else in the chain of command specifically responsible for plant safety. Yet the Court supposes such duty to be in the nature of "general administrative duties of supervision." Very simply, it appears that the Court reasoned inductively from Brown's specific job title, "*General* Manager, Loss Prevention," to "*general* administrative duties" without consideration of the actual duties and responsibilities of the job. The Court's analysis was short-circuited with such ease as to make its conclusion seem appropriate, however erroneous. The record does not reflect Monsanto's organizational chart, but as a normal matter of organizational structure, defendant Brown probably reports to the Plant Manager. The Plant Manager would be cloaked with "general administrative duties" subsuming administratively the totality of plant activities, including safety. In turn, the Plant Manager has properly delegated authority over those specific functional duties associated

with Safety and Loss Prevention to Brown. With absolute certainty it may be stated that the term "General" in Brown's job title designated him to be generally responsible for *all* duties *specifically* relating to the *functional* area of Safety and Loss Prevention. As such, Monsanto's duty of safety to Maxwell has been specifically delegated to Brown. It is unfortunate that the Court focused on the term "General" as contained in Brown's job title as its presence therein is misleading and does not comport with the specific duties of the job. Such symbolic inconsistency leads the Court to err. It is clear that the term "General" in Brown's job title connotes specific accountability for *all* duties of Safety and Loss Prevention. The job title does not suggest accountability for any other functional area of management. It directly and specifically addresses only Safety and Loss Prevention. That is Brown's job and as a matter of individual liability, the buck ought to have stopped there.

Petitioner's case against Rick Brown is well pled as her allegations are specifically directed to his safety duties and accountabilities as Monsanto's Manager of Loss Prevention. There is no fraudulent joinder as Rick Brown is personally liable for Petitioner's injuries as Monsanto's man-in-charge. In *Esco v. Smith*, 468 So.2d 1169 (La. 1985), the plant manager and his assistant were both held liable because their jobs included responsibility for all aspects of plant safety. The court found "a duty owed to plaintiff." It is that very same duty owed herein by defendant, Rick Brown, to this Petitioner.

CONCLUSION

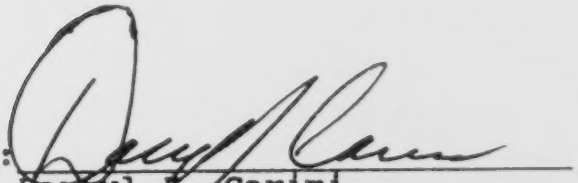
Whether the names are Maxwell, Salsbury, Becker, Harris, LeJune, or Thibodeaux, it's all the same under the *Salsbury* decision. It's just as Justice Lemmon observes in *Rowe v. Northwestern National Insurance Company, et al*, 471 So.2d 266 (La. 1985), the purpose of Section Six has been "systematically distorted by the granting of tort immunity to contracting principles." And, "In effect, the rights of an injured worker against third persons under LSA-R.S. 23:1101, *et seq*, are written out of the Act in unsafe premises cases by allowing tort immunity to principals under LSA-R.S. 23:1061." *Broussard v. Heebe's Bakery, Inc.*, 254 So.2d 284, 289 (La. App. 4th Cir. 1971). The *Salsbury* decision codifies Justice Lemmon's remonstrations in the ultimate extreme making every principal a statutory employer. Meanwhile, the Linda Maxwells and the Paul Salsburys of the world go everyday onto the premises of contracting principals and encounter the dangers by which they are maimed, disabled, killed or otherwise made useless. The danger to which they are exposed is created or countenanced with impunity by tort-feasing principals, but ought not be sanctioned by this Court.

With regard to fraudulent joiner, it is clear that Monsanto and Brown have failed to show, as they must, that there is no possibility that plaintiff would be unable to establish a cause of action in state court. Rick Brown was properly clothed by Monsanto with personal accountability and responsibility for duties of plant safety. Brown is responsible for the hazards and perils to which Petitioner was exposed and thereby injured.

The Fifth Circuit's interpretation of LSA-R.S. 23:1061 in *Salsbury* is contrary to that of the Supreme Court of Louisiana in *Bowen*. Review by this Honorable Court is necessary to resolve the conflict. Petitioner respectfully requests that her petition for a writ of certiorari be granted.

Dated: June 28, 1993.

RESPECTFULLY SUBMITTED,
CARIMI LAW FIRM
A LAW CORPORATION



BY: _____
Darryl J. Carimi
Louisiana Bar No. 3878
208 Maison Morice Building
12A Westbank Expressway
Gretna, Louisiana 70053
Telephone: 504/367-2367

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed Mar 29 1993

No. 92-3385

LINDA LESLIE MAXWELL,

Plaintiff-Appellant,

versus

MONSANTO COMPANY and RICK BROWN,

Defendant-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(March 29, 1993)

Before DUHE, BARKSDALE, Circuit Judges, and TRIMBLE,* District Judge.

PER CURIAM:

* James T. Trimble, Jr., District Judge of the Western District of Louisiana, sitting be designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

Filed Feb 17 1993

No. 92-3385

LINDA LESLIE MAXWELL,

Plaintiff-Appellant,

versus

MONSANTO COMPANY and RICH BROWN,

Defendant-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(91-CV-15E)

Before DUHE, BARKSDALE, Circuit Judges, and TRIMBLE,[1] District Judge.

PER CURIAM:[2]

[1] James T. Trimble, Jr., District Judge of the Western District of Louisiana, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant complains of the district court's refusal to remand this personal injury action to state court, and of the denial of her personal injury claims against Monsanto Company. Having carefully studied the record, read the briefs, and had the benefit of counsels' arguments, we find no error and affirm.

Appellant contends that the joinder of Rick Brown, General Supervisor of Loss Prevention of Monsanto Company, defeats diversity jurisdiction and requires remand. The district court found that the joinder was fraudulent because Appellant would not be able to establish a cause of action against Brown in state court. *See Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992). In so holding, the district court correctly applied the four-part test of *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973). Appellant did not allege that Brown had breached a personal duty he owed to Appellant. *See LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992); *Canter*, 283 So.2d at 720-721. The Appellant's allegations are only that Brown breached his general duty of loss prevention by failing to insure that the loading area was reasonably safe. The district court was correct in holding that these allegations of a breach of general administrative duties of supervision are insufficient to establish personal liability of Brown.

The district court also correctly granted summary judgment in favor of Monsanto Company and against Appellant, finding that Monsanto was exempt from tort liability as Appellant's statutory employer. The legal standard requires that the work being done by the Appellant be "part of" the principal's trade, business or occupation. La. Rev. Stat. Ann. § 23:1061 (West Supp. 1993). The statute,

as amended in 1989, directs the courts to apply the previously discarded "integral relation" test of *Thibodaux v. Sun Oil Co.*, 49 So.2d 852, 854 (La. 1950). *See Salsbury v. Hood Indus., Inc.*, No. 92-4676, slip op. 2220, 2224 (5th Cir. Feb 10, 1993); *Becker v. Chevron Chem. Co.*, No. 92-3504, slip op. 2217, 2218 (5th Cir. Feb. 10, 1993); *Harris v. Murphy Oil, U.S.A., Inc.*, 980 F.2d 991, 993 (5th Cir. 1992). The undisputed facts fully support the district court's holding. Appellant's exclusive remedy is for worker's compensation benefits; Monsanto, her statutory employer, is immune from tort liability. La. Rev. Stat. Ann. §§ 23:1032, 1061 (West Supp. 1993).

Since we find the meaning of the Louisiana statute clear, we decline Appellant's suggestion that the issue be certified to the Louisiana Supreme Court.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Mar 2 1992

LINDA LESLIE MAXWELL — CIVIL ACTION

versus — NO. 91-0015

MONSANTO COMPANY and RICK BROWN, — SECTION: E/4

JUDGMENT

Considering the record, the memoranda of counsel, the Ruling on Motion entered by the Court this date, and the law and for the reasons assigned,

IT IS ORDERED, ADJUDGED and DECREED that there be judgment in favor of defendents, Monsanto Company and Rick Brown and against plaintiff, Linda Leslie Maxwell, DISMISSING plaintiff's complaint, with costs.

IT IS FURTHER ORDERED that the May 28, 1992 final pre-trial conference and the June 22, 1992 jury trial be CANCELED.

New Orleans, Louisiana, March 18, 1992.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Mar 18 1992

LINDA LESLIE MAXWELL — CIVIL ACTION

versus — NO. 91-0015

MONSANTO COMPANY and RICK BROWN, — SECTION: E/4

RULING ON MOTION

The Court has previously (Record Document 13) ruled on a motion for summary judgment filed by defendants asserting a borrowed employee defense and will not here reiterate the factual situation as therein set forth. Suffice to say, discovery has been undertaken in the interim and defendants have now renewed their motion.

The question presented is whether a truck driver employed by a trucking company is considered to be a statutory employee of a company with whom the trucking company contracts when the contract work is part of the trade, business or occupation, or essential thereto, of the principal company.

Defendant Monsanto manufactures chemical products at various plants throughout the United States and elsewhere. In the matter *sub judice* Monsanto was in the

process of having a chemical product manufactured at its Luling, Louisiana, plant trucked to its plant in North Carolina for use there as an essential ingredient for a finished product manufactured there. Obviously this is part of its trade or business.[1] It bears an integral relation to the trade or business. Producing the finished product in North Carolina, or elsewhere, depended on the ingredient produced in Louisiana.

The pertinent statute, LSA R.S. 23:1061, was amended in 1989 to legislatively overrule *Berry v. Holston Well Service, Inc.*, 488 So. 2d 934 (La. 1986). The amendment became effective January 1, 1990. The accident *sub judice* occurred in February, 1990. Louisiana law prior to *Berry* was articulated in *Thibodaux v. Sun Oil Co.*, 218 La. 453, 49 So. 2d 852 (1950) and its progeny.

The court has been provided with excellent memoranda from both plaintiff and defendants but in view of the aforesaid amendment to LSA R.S. 23:1061 agrees with the reasoning and authorities cited set forth in defendants' memoranda.

The motion is, accordingly, **GRANTED.**

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

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[1] Were this product being trucked to a third party consumer such might be only an incidental aspect of the trade or business and might not create a borrowed employee status.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Mar 26 1991

LINDA LESLIE MAXWELL — CIVIL ACTION

versus — NO. 91-0015

MONSANTO COMPANY and RICK BROWN, — SECTION: E/4

RULING ON MOTIONS

Plaintiff, Linda Leslie Maxwell ("Maxwell") had filed a motion to remand her action to the state court from which it was removed. The defendants, Monsanto Company ("Monsanto") and Rick D. Brown ("Brown"), have filed a motion for summary judgment alleging that Linda Leslie Maxwell is a statutory employee of Monsanto and thus is limited to the remedies provided by the Louisiana Worker's Compensation statute. Both motions are opposed.

Defendant Monsanto is a chemical manufacturer who operates a refinery in Luling, Louisiana. Brown is an employee of Monsanto and is the General Supervisor of its Loss Prevention Department. Monsanto entered into a rate agreement with a common carrier, MEL Motor Express, Inc., located in Hammond, Louisiana, for the carrier to ship chemical products to and from various destinations. Mon-

santo may also have owned trucks and utilized them at some times for pick up and delivery.

On Sunday, February 11, 1990, Linda Maxwell, an employee of MEL Motor Express, Inc., and her co-employee, Carolyn Harrison, acting within the course and scope of their employment with MEL Motor Express, Inc., travelled to the Monsanto plant in Luling, Louisiana to pick up a load of twenty super sacks of glyphosate intermediate, each weighing 2,100 lbs., for delivery on February 12, 1990 to Monsanto's Fayetteville, North Carolina plant. When they arrived at the plant, they were instructed to back up the rig to the loading dock. Ms. Maxwell exited the vehicle and was directing Ms. Harrison in backing up the tractor trailer to the loading dock. In the course of that procedure, Ms. Maxwell's right arm was traumatically amputated.

Plaintiff Maxwell has sued Monsanto for negligence in failing to provide the plaintiff with a safe and adequate docking space and in failing to provide a spotter and for strict liability for having an unreasonably dangerous loading area which caused injury to the plaintiff. She has sued Rick Brown, the General Supervisor of Loss Prevention at Monsanto's plant in Luling, Louisiana, making the following allegations against him in her complaint:

> At all times pertinent hereto, Rick Brown was employed by Monsanto Company in its safety department as part of its loss prevention department, and part of his duties involves seeing that the load areas were reasonably safe for trucks and truck drivers who came to pick up at the Monsanto plant. Mr. Brown was negligent in failing to see

> that the loading area was reasonably safe. In particular, it is believed that Mr. Brown knew or should have known that the loading area was unsage [sic] in that there was insufficient space for a truck of the size that plaintiff was signaling in that loading area because of several hazars [sic] such as a nearby drainage ditch, close by electrical poles and guide wires, and failing to provide a spotter.

Complaint, Rec. Doc. No. 1. Plaintiff filed suit in the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana. Defendants Monsanto and Brown removed the matter to this Court, following which they filed the motion for summary judgment under consideration.

Plaintiff suggests that the matter should be remanded because there is not complete diversity of citizenship, as both plaintiff Maxwell and defendant Brown are citizens of Louisiana. Defendants allege that Rick Brown was fraudulently joined because "there is absolutely no possibility that plaintiff will be able to establish a cause of action against Rick Brown." Rec. Doc. No. 8. In support of this allegation, defendants suggest that the Court will grant their motion for summary judgment and thus, the motion to remand will be moot. Defendants suggest no alternate basis for denial of the plaintiff's motion to remand should their motion for summary judgment be denied.

Defendants Monsanto and Brown contend that there is no material issue of fact and that as a matter of law, there should be judgment entered finding that Maxwell is a statutory employee of Monsanto. Louisiana law provides

that any employee who is deemed by virtue of the provisions of LSA-R.S. 23:1032 (1976) to be the statutory employee of the principal, is limited to worker's compensation as its remedy for injuries sustained within the employee's course and scope of employment, excepting any intentional tort. There is no suggestion by any party that either Monsanto or Rick Brown committed an intentional tort against the plaintiff. LSA-R.S. 23:1061, as amended in 1989, provides, in pertinent part:

> A. When any person, in this Section referred to as the "principal", undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person, in this Section referred to as the "contractor", for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; . . . The fact that the work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.

LSA-R.S. 23:1061 (West 1985, with amendments through 1990).

Plaintiff denies that the work being performed by the trucking company is part of Monsanto's "trade, business, or occupation," arguing that any trucking of the materials done by Monsanto was merely "incidental" to their business of manufacturing chemicals. In support of this contention, plaintiff cites *Franklin v. Checker Cab Co.*, 572 So. 2d 773 (La. App. 4th Cir. 1990). The court in *Franklin* held that the deceased worker's family was not entitled to worker's compensation from Checker Cab Co. It found that the decedent, a driver of a Checker cab, was not performing work that was part of Checker Cab's "trade, business, or occupation" because Checker's trade, business or occupation was the leasing of taxicabs, radio service, and goodwill to taxicab drivers. The driving of the cabs was merely "incidental" to its taxicab leasing business.

While defendant Rick Brown's affidavit states that the trucking of chemicals was part of Monsanto's "trade, business or occupation," the Court agrees with the plaintiff that she is entitled to conduct additional discovery on this issue. While Monsanto may have owned trucks, it is not clear from Brown's affidavit whether they in fact trucked the chemicals to various locations or merely employed the trucks to taxi personnel to various errands. For summary judgment purposes, the Court cannot find at this time that there is no dispute as to any material fact, but will grant leave to the defendants to renew their motion for summary judgment following the completion of discovery on this issue.

Also pending for consideration is the plaintiff's motion to remand. Ordinarily, there must be complete diversity of citizenship between all plaintiffs and all defendants for diversity subject matter jurisdiction to lie in federal court. 28 U.S.C. § 1332. However, if the court determines that the non-diverse defendant has been "fraudulently joined," the motion to remand may be denied. The fraudulent joinder doctrine "is simply a shorthand for the issue whether the plaintiff stated a valid cause of action under state law against the non-diverse defendant." *Prince v. Nationwide Ins. Co.,* No. 88-2858, p. 2 (Judge Schwartz) (E.D. La. Feb. 9, 1989). In order for the plaintiff to sustain his claim against the individual employee, who is here the General Supervisor of Loss Prevention, the employee must have breached an independent, personal duty to the customer. *Prince, Id.*; *Smith v. Armstrong,* No. 90-4817, (Judge Livaudais) (E.D. La. Jan. 16, 1991); *Canter v. Koehring Co.,* 283 So. 2d 716, 720-721 (La. 1973).

To determine if the matter must be remanded because the individual owes an independent, personal duty to the plaintiff, the following four-part test should be considered:

> (1) The employer must owe a duty of care to the customer;
> (2) This duty must be delegated by the employer to the particular employee;
> (3) The employee must have breached this duty through his own personal fault; and
> (4) Personal liability cannot be imposed on the employee simply because of his general administrative responsibility for performance of

> some function of employment; he must have a personal duty to the plaintiff that was not properly delegated to another employee.

Canter, 283 So.2d at5 721; *Miller v. Upjohn Co.,* 465 So. 2d 42, 47 (La. App. 1st Cir. 1985), *writ denied* 467 So. 2d 533 (La. 1985); *Prince,* No. 88-2858 at p. 3; *Williams v. Stutts,* No. 89-5417 (Judge Feldman) (E.D. La. May 25, 1990); *Smith,* No. 90-4817 at p. 2.

The plaintiff does not allege that defendant Rick Brown personally instructed her or insisted that she back up the truck to the loading area or that he himself designed the unsafe work area. She alleges that he breached his general duty of loss prevention by failing to ensure that the loading area was reasonably safe. Plaintiff seeks to impose liability on the General Supervisor of Loss prevention for breaches of his general administrative duties of supervision. In these circumstances, he cannot be held personally liable to the plaintiff. *Canter,* 283 So. 2d at 721; *Williams,* No. 5417 at p. 3; *Mayer v. Wal-Mart Stores, Inc.,* No. 89-3781 (Judge Wicker) (E.D. La. June 8, 1990). Under the fraudulent joinder doctrine, the action was properly removed and remand not warranted.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of the defendants Monsanto Company and Rick D. Brown for summary judgment be and is hereby **DENIED** with leave to renew following the completion of discovery on the issue of whether plaintiff was a statutory employee of Monsanto;

IT IS FURTHER ORDERED that the motion of the plaintiff Linda L. Maxwell to remand be and is hereby **DENIED.**

The parties are to conduct discovery on the statutory employee issue within 90 days from the date of entry of this ruling. Thereafter, defendants are granted leave to renew their motion for summary judgment.

New Orleans, Louisiana, March 26, 1991.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LINDA LESLIE MAXWELL	*	CIVIL ACTION NO.
	*	
	*	SECTION
	*	
MONSANTO COMPANY,	*	
AND	*	
RICK BROWN	*	
	*	

****

NOTICE OF REMOVAL

TO: James C. Klick, Esq.
111 Veterans Memorial Highway,
Suite 400
Metairie, Louisiana 70005

Hon. Charles J. Oubre, Jr.
Clerk of Court
Parish of St. Charles
P. O. Box 424
Hahnville, Louisiana 70057

PLEASE TAKE NOTICE that defendants Monsanto Company and Rick D. Brown hereby remove the above-

entitled action from the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana, to the United States District Court, Eastern District of Louisiana. Removal is based on diversity of citizenship. Value of the case exclusive of interests and costs exceeds $50,000.00.

On November 29, 1990, plaintiff Linda Leslie Maxwell filed Civil Action No. 37,651, Division "D", in the 29th Judicial District Court for the Parish of St. Charles, State of Louisiana; that petition, copy of which is attached hereto as Exhibit "A", named as defendants Monsanto Company and Rick D. Brown.

Monsanto Company is a foreign corporation organized under the laws of the State of Delaware and having its principal place of business in the State of Missouri.

Rick D. Brown is a resident of the State of Louisiana, but Rick D. Brown is a sham defendant against whom plaintiff has failed to state a claim; Rick D. Brown was named as a defendant solely to defeat diversity jurisdiction.

Defendant Monsanto Company was served with citation and petition through its agent for service of process on December 14, 1990. Defendants have filed no pleadings in the State Court action and certify that plaintiff's petition is the only pleading filed in the State Court action.

WHEREFORE, defendants Monsanto Company and Rick D. Brown hereby remove Civil Action No. 37,651, Division "D", entitled "Linda Leslie Maxwell versus Monsanto Company and Rick Brown" from the 29th Judicial

District Court for the Parish of St. Charles, State of Louisiana, to the United States District Court, Eastern District of Louisiana.

Respectfully submitted,

LEMLE & KELLEHER

BY: /s/ C.W.Bradley, Jr.

(Bar No. #3371)
BRIAN C. MISSHORE (#17328)
DWIGHT C. PAULSEN, III (#19729)
2100 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

Attorneys for Defendants
Monsanto Company and
Rick D. Brown

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 2nd day of January, 1991 served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ C.W. Bradley, Jr.

APPENDIX G

§ 1061. Principal contractors; liability

A. When any person, in this Section referred to as the "principal", undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person, in this Section referred to as the "contractor", for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed. **The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.**

APPENDIX H

29TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. CHARLES

STATE OF LOUISIANA

LINDA LISLIE MAXWELL	CIVIL ACTION
VERSUS	NUMBER:
MONSANTO COMPANY AND RICK BROWN	DIVISION:

FILED: _____ _____
DEPUTY CLERK

PETITION FOR DAMAGES

Plaintiff, LINDA LESLIE MAXWELL, a major domiciled in the Parish of Grant, State of Louisiana respectfully represents:

1.

Made defendant herein is MONSANTO COMPANY, a foreign corporation, authorized to do and doing business in the Parish of St. Charles, State of Louisiana.

Also made defendant herein is RICK B ROWN, upon information and belief is a person of full age and majority, domiciled in the State of Louisiana.

2.

On or about February 11, 1990, plaintiff, LINDA LESLIE MAXWELL, was employed by Melmotor Express, Inc. in St. Tammany Parish, State of Louisiana.

3.

On or about February 11, 1990 LINDA LESLIE MAXWELL and her co-employee Carol Harrison were instructed to pick up super sacks of what is believed to be weed killer at the MONSANTO facility in Luling, Louisiana for Interstate transportation.

4.

When plaintiff and her co-employee arrived at the MONSANTO facility, they were directed to a specific loading dock to load the super sacks.

5.

When plaintiff and her co-employee arrived at the loading dock area, the only available docking place was grossly inadequate for docking a truck and trailer of the size that plaintiff's co-employee was driving.

6.

In particular, the proximity of a drainage ditch, electrical pole, guide wires from the electric pole and the overall design of the dock area made it extremely difficult and virtually impossible for the petitioner and her co-employee to safely back-up their truck and trailer into the proper posi-

tion for loading.

7.

As a result of the inadequate docking facility, it was necessary for petitioner LINDA LESLIE MAXWELL, to get out of the truck to be a spotter for her co-employee.

8.

In the process of maneuvering the truck and trailer into the loading space, petitioner's right arm was traumatically amputated during this procedure.

9.

Defendant, MONSANTO COMPANY, was negligent in causing injury to petitioner in the following particulars or as may be shown at trial:

1) Failing to provide petitioner with adequate docking space for the truck and trailer which petitioner was working with;

2) Having a loading area that contained several hazards, such as a nearby drainage ditch, in close proximity to electrical poles and guide wires making the maneuvers of the trailer and truck extremely difficult to safely dock this truck and trailer without incident;

3) Failing to provide a spotter;

4) Having so much noise going on at it's facility

that petitioner and driver could not properly communicate during loading operations;

5) Failing to provide petitioner with a reasonably safe loading facility.

10.

Defendant, MONSANTO COMPANY, is strictly liable for the injuries sustained under Article 2317 and 2322 of the Louisiana Civil Code on the grounds that the premises under the control and operation of said defendant were defective and/or unreasonably dangerous which defect cause injury to petitioner.

11.

At all times pertinent hereto, Rick Brown was employed by Monsanto Company in its safety department as part of its loss prevention department, and part of his duties involved seeing that the load areas were reasonably safe for trucks and truck drivers who came to pick up at the Monsanto plant. Mr. Brown was negligent in failing to see that the loading area was reasonably safe. In particular, it is believed that Mr. Brown knew or should have known that the loading area was unsafe in that there was insufficient space for a truck of the size that plaintiff was signaling in that loading area because of several hazars such as a nerby drainage ditch, close by electrical poles and guide wires, and failing to provide a spotter.

12.

As a result of the accident described above, plaintiff sustained severe injury to her body, primarily a traumatic

amputation of her right arm as well as severe injury to her mind and psychological health. She has suffered in the past and will continue to suffer in the future. She has sustained significant medical expenses in the past and will continue to incur medical expenses in the future. She is presently disabled from work as a truck driver and it is believed that she may be permanently disabled from working as a truck driver. She has suffered a permanent loss of her right arm.

13.

Plaintiff seeks damages that are reasonable under the premises for her loss of past and future medical expenses, loss of past and future earnings and earning capacity, pain, suffering, mental anguish, physical disability, mental disability, and for loss of a limb. Plaintiff further alleges that the damages in this case exceed $20,000.00 exclusive of interest and cost.

14.

Plaintiff prays for trial by jury.

WHEREFORE, plaintiff, LINDA LESLIE MAXWELL, prays that the defendants be served with a copy of this petition and that after due proceedings there be judgment in favor of the plaintiff and against the defendants jointly and *insolido,* Monsanto Company and Rick Brown, for damages that are reasonable under the premises, for all costs, and interests to run from date of judicial demand until paid.

Plaintiff further prays for trial by jury.

Respectfully submitted,

CARIMI LAW FIRM
A LAW CORPORATION

BY: /s/ James C. Klick,

James C. Klick, T.A.
Louisiana Bar No. 7451
208 Maison Morice Building
12A Westbank Expressway
Gretna, Louisiana 70053
Telephone: 504/367-2367

BY: /s/ Darryl J. Carimi

Darryl J. Carimi
Louisiana Bar No. 3878
208 Maison Morice Building
12A Westbank Expressway
Gretna, Louisiana 70053
Telephone: 504/367-2367

BY: /s/ I. David Warner

I. David Warner
Louisiana Bar No. 13247
208 Maison Morice Building
12A Westbank Expressway
Gretna, Louisiana 70053
Telephone: 504/367-2367

PLEASE SERVE:

MONSANTO COMPANY
through their agent for service of process:
C.T. Corporation
601 Poydras Street
New Orleans, Louisiana 70130

RICK BROWN
at his place of employment:
Monsanto Company
Hwy. 18
Luling, Louisiana 70070

Supreme Court, U.S.
FILED
JUL 27 1993
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NO. 93-23

In the Supreme Court of the United States

OCTOBER TERM, 1993

LINDA LESLIE MAXWELL,
Petitioner

versus

MONSANTO COMPANY AND RICK BROWN,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF MONSANTO COMPANY AND RICK BROWN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

LEMLE & KELLEHER

GERALD J. TALBOT (12629)
21st Floor, 601 Poydras Street
Pan American Life Center
New Orleans, Louisiana 70130
Telephone: (504) 586-1241
Attorneys for Respondents

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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QUESTION PRESENTED

1. Whether or not this Honorable Court should exercise its discretionary review under 28 USC §1254(1) to grant a writ of certiorari to review determinations of state law made by the United States Fifth Circuit Court of Appeals sitting in a diversity case.

PARTIES TO THE PROCEEDING

1. Linda Leslie Maxwell

2. Monsanto Company

3. Rick Brown

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OPINIONS BELOW AND JURISDICTIONAL STATEMENT

The opinions below and jurisdictional statement were presented correctly by the petitioner.

STATUTORY PROVISIONS INVOLVED

This case involves LSA-R.S.. 23:1061, as amended in 1989, effective 1990.

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OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The statement of the case presented by the petitioner is correct except insofar as it suggests that: (1) there are conflicting interpretations of LSA-R.S. 23:1061, as amended in 1989; and, (2) that the Fifth Circuit Court of Appeals

misinterpreted state jurisprudence concerning the personal liability of corporate executive officers. These matters are discussed in the argument section of this opposition.

SUMMARY OF ARGUMENT

Petitioner's application presents no special and important reasons for granting the writ of certiorari. None of the considerations found in Rule 10 of the Rules of the Supreme Court are present in this case. Petitioner's suggestion that there are conflicting interpretations of LSA-R.S. 23:1061 is incorrect. Finally, the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals were correct in their interpretation of Louisiana state law governing executive officer liability.

ARGUMENT

THE CONSIDERATIONS FOUND IN RULE 10 OF THE RULES OF THE SUPREME COURT ARE NOT PRESENT IN THIS CASE

Rule 10 of the rules of the Supreme Court provides in part that:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of the United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

As can be seen from Petitioner's Questions Presented, none of the "character of reasons" found in Rule 10 are present in this case. The Questions Presented by the Petitioner ask this Court to review interpretations of state law made by the United States Fifth Circuit Court of Appeals in a diversity case. This court has stated with regard to review of state court determinations by a court of appeals that a "challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 US 306, 314 N. 8, 103 S.Ct. 2368, 2373 N. 8, 76 L.Ed. 2d 595.

PETITIONER'S SUGGESTION THAT THE LOUISIANA SUPREME COURT AND THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS HAVE CONFLICTING INTERPRETATIONS OF LSA R.S. 23:1061 IS INCORRECT

Petitioner argues that a writ should be granted because the United States Fifth Circuit Court of Appeals misinterpreted the amendment to LSA-R.S. 23:1061. The United States Court of Appeals for the Fifth Circuit interpreted the amendment to LSA-R.S. 23:1061 to mean that "the factors listed in the amendment cannot be used by themselves *or* in combination with other factors to defeat statutory employer status." *Salsbury v. Hood Industries*, 982 F.2d 912 (5th Cir. 1993). Because this amendment was only to be applied prospectively, the Fifth Circuit noted in *Salsbury* that it has not been applied by any Louisiana courts. The Fifth Circuit relied on statements from Louisiana appellate courts and concluded that the amendment overruled the *Berry* case, discussed at pages 4-5 of petitioner's writ application, and returned the statutory employer analysis to the "integaral relation" test found in *Thidobeaux v. Sun Oil*, 49 So.2d 852 (La. 1950). *Salsbury v. Hood Industries*, 982 F.2d at 915. It is this interpretation of the amendment that the Court of Appeals applied in the instant case. Petitioner suggests that this interpretation is contrary to an interpretation made by the Louisiana Supreme Court in *Bowens v. General Motors Corp.*, 608 So.2d 999 (La. 1992). Petitioner's argument is without merit.

Petitioner cites the following language from *Bowens* in support of her contention:

> This amendment apparently broadens the definition of statutory employers. However, given the facts of the present case, we believe the outcome would be the same under the amended statute as under the pre-amended statute.

Bowens v. General Motors Corp., 608 So.2d at 1001, note 4.

Petitioner then argues that:

> with that statement, the Supreme Court of Louisiana specifically refutes the Fifth Circuit's rejection of the *Berry* analysis. According to the Supreme Court, the amendment does not reject the *Berry* analysis, but instead incorporates that analysis into the wider customary practices test as developed by the Supreme Court, in *Reeves v. Louisiana and Arkansas Railway Co., et al*, 282 So.2d 503 (1973). No other interpretation would be commensurate (sic) with the Supreme Court's assessment that, "the outcome would be the same under the amended statute as under the pre-amendment statute." [Petitioner's application for writ pgs. 7-8]

It is hard to conceive how petitioner interprets the aforementioned language from *Bowens* to mean that the *Berry* factors are now incorporated into the broader analysis of statutory employment. *Bowens* was decided under the *Berry* factors and, as a result, the Louisiana Supreme Court was not faced with the meaning of the new amendment. Although the Louisiana Supreme Court recognized that the amendment "apparently *broadens* the

definition of statutory employers," 608 So.2d at 1001, n.4. (emphasis added) nowhere did the court state that the *Berry* factors are still to be considered. Further, this quote from *Bowens* only states that the *outcome* would be the same under the amended statute and the pre-amendment statute. The quote, then, only means that the result would be the same, i.e., that General Motors would be the statutory employer under either analysis. Given that the amendment broadened the definition of statutory employment, if a principal was found to be a statutory employer under the restrictive *Berry* analysis, then that principal would also be a statutory employer under the new broadened definition. Thus, contrary to petitioner's assertion, *Bowens* is in no way inconsistent with *Salsbury*.

Based on existing Louisiana jurisprudence, the United States Fifth Circuit Court of Appeals correctly interpreted and applied LSA-R.S. 23:1061 as amended in 1989. As such, petitioner's petition for writ of certiorari should be denied.

THE DISTRICT AND APPELLATE COURTS CORRECTLY APPLIED LOUISIANA LAW WITH RESPECT TO EXECUTIVE OFFICER LIABILITY

Petitioner also argues that the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals misinterpreted and misapplied the law relative to executive officer liability found in *Canter v. Koehring Company,* 283 So.2d 716 (La. 1973) in finding fraudulent joinder of a Monsanto safety supervisor. Petitioner argues that nowhere in *Canter* or its progeny is it required that there be any personal con-

tact between the executive officer and the person injured. This argument ignores the express language of the Louisiana Supreme Court in *Esco v. Smith*, 468 So.2d 1169 (La. 1985). In *Esco* the Supreme Court stated:

> In order for a corporate officer to be held liable for purported personal fault or negligence which arises out of a breach of duty, that person must have some *personal contact* and *responsibility towards* the injured employee. *Raley v. Carter*, 401 So.2d 1006 (La. App. 1st Cir. 1981) (emphasis added).

468 So.2d at 1175.

Based on this language, the district court and the court of appeals were correct in requiring allegations of personal contact between Rick Brown and the petitioner in order for petitioner to state a claim against Rick Brown. Because there were no allegations of personal contact, the district court and court of appeals were correct in finding that Rick Brown was fraudulently joined. It is interesting to note that petitioner cites the *Esco* decision as holding a plant manager and his assistant liable to an injured plaintiff because their jobs included responsibility for plant safety. What petitioner fails to mention is that these two employees were held liable because they were on the jobsite and were responsible for day to day operations. *Esco vs. Smith*, 468 So.2d at 1176. Petitioner also fails to explain that two other supervisory employees in *Esco* were absolved from liability because they had delegated their duties to responsible subordinates, had seldom visited the jobsite *and* were unaware of the existence of the hazardous condi-

tion. *Esco v. Smith,* 468 So.2d at 1175. Similarly, in the instant case, Rick Brown was not alleged to be on the jobsite when petitioner was injured and was not alleged to have created the alleged hazardous condition.

CONCLUSION

Petitioner's petition for a writ of certiorari to this Court asks this Court to review decisions of a United States Court of Appeals interpreting state law in a diversity case. Respondents respectfully suggest that this is not the type of case that is worthy of review. With regard to the United States Fifth Circuit Court of Appeals interpretation of LSA-R.S. 23:1061, this interpretation is in line with those Louisiana state court decisions on the subject and was correctly applied in this case. The interpretation is not contrary to the decision of the Louisiana Supreme Court in *Bowens vs. General Motors Corp.*, as suggested by the petitioner. Finally, with regard to executive officer liability, the district court and court of appeals were correct in requiring either an allegation of personal contact between Rick Brown and petitioner, or an allegation of facts establishing a personal duty owed by Rick Brown to the petitioner in order to hold him liable. Petitioner's complaint lacked either allegation. As such, the district court and court of appeals were correct in finding that Rick Brown was fraudulently joined. Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,
LEMLE & KELLEHER

BY: _____

GERALD J. TALBOT
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130-6097
Telephone: (504) 586-1241
Attorneys for Respondents